

01
02
03
04
05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 REINALDO SANCHEZ,) CASE NO. C08-0530-RSM
08 Plaintiff,)
09 v.) REPORT AND RECOMMENDATION
10 MICHAEL J. ASTRUE,) RE: SOCIAL SECURITY APPEAL
Commissioner of Social Security,)
11 Defendant.)
12 _____)

13 Plaintiff Reinaldo Sanchez proceeds through counsel in his appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
15 plaintiff's applications for benefits under Title II and Title XVI of the Social Security Act after a
16 hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the
17 administrative record (AR), and all memoranda of record, the Court recommends that the
18 Commissioner's decision be AFFIRMED.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born in 1963¹ in Puerto Rico and immigrated with his family to Milwaukee,
21 _____

22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 Wisconsin in 1989. He has a ninth grade education, and his first language is Spanish. Between
02 1989 and 2002 (with the single exception of 1993), plaintiff was employed either as a cleaner, fish
03 processor, or packager.

04 Plaintiff received General Assistance Unemployable benefits through the State of
05 Washington Department of Social & Health Services beginning on July 6, 2004. (AR 395.) On
06 that same day, plaintiff filed applications for disability insurance benefits and supplemental security
07 income, alleging disability due to depression, Post Traumatic Stress Disorder (PTSD), tongue
08 laceration, broken jaw, and back pain beginning January 1, 2003. (AR 36.) Both claims were
09 denied on August 31, 2004, and upon reconsideration on April 25, 2005, due to lack of evidence.
10 (AR 36, 41-42.)

11 Thereafter, plaintiff filed a timely written request for a hearing on May 31, 2005. ALJ John
12 Adams held a hearing on August 10, 2006, at which plaintiff and counsel appeared. A second
13 hearing was held in front of ALJ Adams on January 3, 2007, at which Joseph A. Moisan, Ed.D.,
14 an impartial vocational expert, testified. On March 15, 2007, the ALJ issued a decision denying
15 benefits. Plaintiff appealed the decision to the Appeals Council, which denied his request for
16 review on March 15, 2007. On April 4, 2008, plaintiff filed a civil action in this Court for review
17 of the Commissioner's final decision.

18 JURISDICTION

19 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

20
21
22

official policy on privacy adopted by the Judicial Conference of the United States.

01 **DISCUSSION**

02 The Commissioner follows a five-step sequential evaluation process for determining
03 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
04 be determined whether the claimant is gainfully employed. The ALJ found that plaintiff met the
05 insured status requirements and had not engaged in substantial gainful activity since January 1,
06 2003, the alleged onset date. (AR 24.) At step two, it must be determined whether a claimant
07 suffers from a severe impairment(s). The ALJ determined that plaintiff had the severe impairments
08 of depression and alcohol abuse but that the record did not support that plaintiff had medically
09 determinable PTSD or a back impairment. (AR 24.) Step three asks whether a claimant's
10 impairments meet or equal a listed impairment. The ALJ found that plaintiff did not have an
11 impairment or combination of impairments that met or medically equaled one of the listed
12 impairments. If a claimant's impairments do not meet or equal a listing, the Commissioner must
13 determine at step four whether the claimant has demonstrated an inability to perform past relevant
14 work.

15 Plaintiff's case was decided at step four. The burden is on the claimant to establish that
16 he or she is unable to return to their former type of work due to a medical impairment that could
17 reasonably be expected to produce the symptoms alleged. *Smolen v. Chater*, 80 F.3d 1273, 1281-
18 82 (9th Cir. 1996); *accord Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990) ("The burden
19 of establishing disability is initially on the claimant, who must prove that [he] is unable to return
20 to [his] former type of work."); *see* 20 C.F.R. §§ 404.1512, 416.912. The adjudicator reaches a
21 determination based on a review of a claimant's residual functioning capacity (RFC) and the
22 physical and mental demands of the work he or she previously performed. *See* 20 C.F.R. §§

01 404.1520(e), 416.920(e). If the adjudicator determines the claimant has the RFC required to
02 perform his past relevant work, the claimant is found not disabled and no step five analysis is
03 required. *See* 20 C.F.R. § 416.961. The ALJ determined that plaintiff “was capable of
04 performing past relevant work as a cleaner and packing line worker” and was not disabled. (AR
05 31-32.) Accordingly, no step five analysis was conducted.

06 This Court’s review of the ALJ’s decision is limited to whether the decision is in
07 accordance with the law and the findings supported by substantial evidence in the record as a
08 whole. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005); *Penny v. Sullivan*, 2 F.3d
09 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a
10 preponderance; it means such relevant evidence as a reasonable mind might accept as adequate
11 to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is
12 responsible for determining credibility, resolving conflicts in medical testimony, and for resolving
13 ambiguities, *see Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995), based on specific,
14 cogent reasons. *See Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). However, if there
15 is more than one rational interpretation, one of which supports the ALJ’s decision, the Court must
16 uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

17 Plaintiff contends that the ALJ improperly found that his subjective pain testimony was not
18 credible and failed to utilize a vocational expert to assess his residual earning capacity. Defendant
19 argues that the ALJ’s findings were supported by substantial evidence and not contrary to the law.
20 For the reasons described below, the Court recommends that the decision be affirmed.

21 Mr. Sanchez’s Subjective Symptom Testimony

22 Where there is no evidence of malingering, the ALJ must provide clear and convincing

01 reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044,1049 (9th Cir.
02 2001); *see also Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). In finding a
03 claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently
04 specific findings, supported by substantial evidence. "General findings are insufficient; rather, the
05 ALJ must identify what testimony is not credible and what evidence undermines the claimant's
06 complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "We require the ALJ to build
07 an accurate and logical bridge from the evidence to her conclusions so that we may afford the
08 claimant meaningful review of the SSA's ultimate findings." *Blakes ex rel. Wolfe v. Barnhart*, 331
09 F.3d 565, 569 (7th Cir. 2003).

10 Whenever a claimant submits objective medical findings establishing an underlying medical
11 or mental impairment that would normally produce a certain level of symptoms, the intensity,
12 persistence, and functionally limiting effects of the symptoms must be evaluated to determine the
13 extent to which the symptoms affect the individual's ability to do basic work activities. *See* 20
14 C.F.R. §§ 404.1529(C), 416.929(C); SSR 96-7p; *Smolen*, 80 F.3d at 1281. In evaluating the
15 intensity and persistence of the claimant's symptoms, the adjudicator is required to make a finding
16 about the credibility of the individual's statements. 20 C.F.R. §§ 404.1529(C)(4), 416.929(C)(4);
17 *see* SSR 96-7p. In cases of excess pain testimony, a claimant need not produce medical evidence
18 to support the severity of that claim. *Light v. SSA*, 119 F.3d 789, 792 (9th Cir. 1997); *accord*
19 *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991). "'Excess pain' is, by definition, pain that
20 is unsupported by objective medical findings." *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir.
21 1986), *superseded by statute on other grounds as stated in Bunnell v. Sullivan*, 912 F.2d 1149
22 (9th Cir. 1990). Accordingly, the ALJ "may not discredit a claimant's testimony of pain and deny

01 disability benefits solely because the degree of pain alleged by the claimant is not supported by
02 objective medical evidence.” *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995) (citing *Bunnell*
03 *v. Sullivan*, 947 F.2d at 346-47); *see* SSR 96-7p. “To find the claimant not credible the ALJ must
04 either rely on reasons unrelated to the subjective testimony, (e.g., reputation for dishonesty), on
05 conflicts between his testimony and his own conduct, or on internal contradictions in that
06 testimony.” *Light*, 119 F.3d at 792; *accord Orteza*, 50 F.3d at 750 (“Factors that the adjudicator
07 may consider when making such credibility determinations include the claimant’s daily activities,
08 inconsistencies in testimony, effectiveness or adverse side effects of any pain medication, and
09 relevant character evidence.”).

10 The ALJ is permitted to consider daily living activities in his credibility analysis. “[I]f a
11 claimant engages in numerous daily activities involving skills that could be transferred to the
12 workplace, the ALJ may discredit the claimant’s allegations upon making specific findings relating
13 to those activities.” *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005); *accord Curry v.*
14 *Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990) (holding that an ALJ is to note any activities that
15 “[m]ay be seen as inconsistent with the presence of a condition which would preclude all work
16 activity”). In *Curry*, the Court upheld the denial of disability benefits where the claimant could
17 “take care of her personal needs, prepare easy meals, do light housework, and shop for some
18 groceries,” because such evidence was adequate to support a conclusion that the claimant was
19 capable of performing light work. *Id.* Elsewhere, the Ninth Circuit held that claimants should not
20 be “penalized for attempting to lead normal lives in the face of their limitations.” *Reddick v.*
21 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). However, that conclusion was reached where
22 claimant’s efforts were “sporadic and punctuated with rest” and thus her conduct was “fully

01 consistent” with her disability. *Id.*; see also *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)
02 (noting that a claimant is not required to be totally disabled to be eligible for benefits and that
03 “many home activities are not easily transferable to what may be the more grueling environment
04 of the workplace, where it might be impossible to periodically rest or take medication”).

05 The ALJ assessed plaintiff’s credibility as follows:

06 Claimant’s credibility is limited. Initially, he did not answer questions at the hearings,
07 and faked a lack of understanding. Upon further questioning, he began to open up
08 and was very articulate. He does not appear to have any significant limitations in his
09 ability to understand or speak English He currently has his own apartment, is
10 sober, gets food stamps, can afford cable television, and shops at Grocery Outlet by
riding the bus. At one point he was able to work on his car. He has a bus pass. He
gets full medical care and is comfortable. With his current set-up, he apparently
perceives no need to work. He wants to avoid street people, alcoholics, and drug
users, which is very reasonable.

11 (AR 32.) Defendant avers that the ALJ properly rejected plaintiff’s claims of complete disability
12 based on his activities and appearance, as well as his lack of candor about his ability to speak
13 English. (Def. Br. at 4-5.) Plaintiff contends that the ALJ lacked any evidentiary foundation for
14 finding his testimony not credible. (Pl. Br. at 3-4.) “A fair reading of the testimony shows no
15 basis whatsoever to indicate that plaintiff ‘faked a lack of understanding.’ Moreover, no where
16 does a fair reading of the record indicate that the plaintiff ‘was very articulate.’” (*Id.* at 4.)
17 Further, plaintiff argues that “none of the other ‘reasons’ advanced by the defendant to support
18 the ALJ’s credibility determination are in any rational way connected to credibility.” (Pl. Reply
19 Br. at 1.)

20 The ALJ offered clear and convincing reasons based on substantial evidence for finding
21 that plaintiff’s symptoms were less than he alleges. The ALJ found that there were inconsistencies
22 between plaintiff’s claims and his daily activities. There was no suggestion that his activities were

01 sporadic or punctuated with a need for rest. The ALJ also found that plaintiff was disingenuous
02 about his English language comprehension. Plaintiff, testifying without an interpreter, answered
03 all questions put to him. *See Green v. Heckler*, 803 F.2d 528, 532 (9th Cir. 1986) (stating that
04 ALJ's credibility determinations are entitled to great deference); *Sample v. Schweiker*, 694 F.2d
05 639, 642 (9th Cir. 1982) ("Questions of credibility and resolution of conflicts in the testimony are
06 functions solely of the Secretary."); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) ("We
07 will not reverse credibility determinations of an ALJ based on contradictory or ambiguous
08 evidence."). Accordingly, the ALJ's credibility finding should be upheld.

09 Testimony of a Vocational Expert.

10 At step four, the inquiry is whether a claimant may perform his past relevant work. The
11 use of a vocational expert's testimony is not required to reach this determination. SSR 82-61
12 states that the step four analysis only requires the testimony of a vocational expert "where
13 available documentation and vocational resource material are not sufficient to determine how a
14 particular job is usually performed." *See also Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1996)
15 (noting that the inquiry whether a claimant may perform his past relevant work does not require
16 the use of vocational testimony). If a claimant can do his or her previous work, the ALJ will
17 determine that claimant is not disabled. *See* 20 C.F.R. §§ 404.1561, 416.961.

18 The ALJ assessed plaintiff's residual functional capacity as follows:

19 After careful consideration of the entire record, the undersigned finds that the
20 claimant has the residual functional capacity to do all levels of physical work. He can
21 adequately perform the mental activities generally required by competitive,
22 remunerative unskilled work as follows: he can understand, remember and carry out
simple instructions; he can make judgements commensurate with the functions of
unskilled work such as simple work-related decisions; he can respond appropriately
to supervision, coworkers, and usual work situations; and he can deal with changes

01 in a routine work setting without contact with the general public.

02 (AR 25.)

03 The ALJ called a vocational expert to testify at step four for the limited purpose of
04 describing plaintiff's past relevant work. The expert testified that plaintiff's past work as a cleaner
05 was medium unskilled work; laborer/fish packer was medium semiskilled work; packager/laborer
06 was heavy semiskilled work, and; packing line worker, was light unskilled work. (AR 32-33.)
07 The ALJ concluded that plaintiff was capable of performing past relevant work as a cleaner and
08 packing line worker, based on his residual functional capacity to do all physical work and the
09 mental capacity generally required for unskilled work. (*Id.*) The ALJ therefore concluded that
10 plaintiff was not disabled.

11 Defendant concurs with the ALJ's use of a vocational expert, asserting that the ALJ has
12 the discretion whether or not to call a vocational expert at step four and is only required to call
13 on one where there is an absence of other reliable evidence. (Def. Br. at 6.)

14 Plaintiff argues that when a claimant has a severe non-exertional impairment(s), an ALJ
15 is required to take the testimony of a vocational expert to determine whether he can return to his
16 past relevant work or his ability to perform any work. (Pl.'s Br. at 4.) Plaintiff cites *Burkhart v.*
17 *Bowen*, 856 F.2d 1335, 1340 (9th Cir. 1988), in support of his contention that a vocational expert
18 had to be called. However, that case makes clear that the testimony of a vocational expert is only
19 required at step five, after the ALJ finds that the claimant cannot return to his former work
20 "because of significant mental and manipulative non-exertional limitations." *Id.* at 1341.

21 The Court recommends that the step four determination be upheld as in accordance with
22 law.

01 **CONCLUSION**

02 For the reasons set forth above, it is recommended that the Commissioner's decision in
03 this matter be AFFIRMED.

04 DATED this 2nd day of December, 2008.

05 
06 Mary Alice Theiler
07 United States Magistrate Judge
08
09
10
11
12
13
14
15
16
17
18
19
20
21
22